NEGARA PROPERTIES SDN. BHD.

v.

AKITEK BERSEKUTU, MALAYSIA (SUED AS A FIRM) & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
[CIVIL SUIT NO. F25(23) - 283 OF 1986]
DATO' DR. VISU SINNADURAI J
15 APRIL 1995

CIVIL PROCEDURE: *Application to strike out claim for want of prosecution - Whether there was inordinate and inexcusable delay - Whether fair trial of action possible - Claim against professional person - Claim to be decided by evidence of witnesses - Inability of defendants to locate witnesses - Whether delay had caused serious prejudice to defendants - Whether complexity of case justification for delay - On whom lies the duty of ensuring speedy disposal of cases - Consideration of O. 3 r. 6 of the Rules of the High Court 1980 - Consideration of the principles governing the exercise of the Court's discretion to strike out for want of prosecution - Rules of the High Court 1980, O. 32 r. 4.*

The plaintiff, a housing developer, commenced legal proceedings against the defendants after two houses in a housing scheme under construction by the plaintiffs collapsed. The defendants were involved in the construction of the project. The first defendant, the consulting architects and the sixth defendant, a firm of quantity surveyors, subsequently applied to strike out the plaintiff's claim for want of prosecution. The learned Senior Assistant Registrar allowed the application and struck out the claim. The plaintiff appealed.

Held:

[1] The general principles governing the power of the Courts to strike out actions for want of prosecution are well settled. In *Birkett v. James*, the House of Lords stated that a Judge has the discretionary power to strike out an action for want of prosecution where the default has been intentional and contumelious; or where the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim; and that such delay gives rise to substantial risks that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the defendant.

[2] In the present case it can be seen that there were many periods of delay on the part of the plaintiff. The plaintiff's contention that this was caused by the sheer complexity of the case was not persuasive. The complexity of a case provides no justification for the inordinate delay on the part of the plaintiff and in the circumstances the defendants have satisfied the

first of the preconditions of establishing inordinate and inexcusable delay on the part of the plaintiff.

[3] The rules of the Court impose a duty on the plaintiff to get the machinery moving for the early disposal of the plaintiff's claim. It is always for the plaintiff to take all the steps to prosecute the claim and the entire machinery does not come to a halt just because the defendant had not taken the next necessary steps. In the circumstances the defendants' conduct in not complying with the order of the SAR did not bar them from making the present application to strike out the plaintiff's action.

[4] The delay in prosecuting the claim would not only result in a fair trial not being possible, but has also caused serious prejudice to the defendants. As the case depends mainly on oral testimony rather than documentary evidence, the testimony of witnesses is crucial. However, certain of these witnesses cannot be traced, and of those who are available, their memory may be impaired by the long delay of almost 10 years. In addition, the fact that both the defendants are professionals is an important factor to consider, though it is not necessarily the sole factor. In the circumstances, the plaintiff's appeal against the decision of the SAR must be dismissed.

[Appeal dismissed]

Cases referred to:

Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 ***(foll)***

Antcliffe v. Gloucester Health Authority [1992] 1 WLR 1044 ***(refd)***

Birkett v. James [1978] AC 297; [1977] 2 All ER 801; [1977] 3 WLR 38 ***(foll)***

Biss v. Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125; [1978] 1 WLR 382 ***(refd)***

Costellow v. Somerset County Council [1993] 1 All ER 952 ***(refd)***

County & District Properties Ltd. v. Lyell [1991] 1 WLR 683 ***(not foll)***

Department of Transport v. Chris Smaller (Transport) Ltd. [1989] AC 1197; [1989] 1 All ER 897; [1989] 2 WLR 578 ***(foll)***

Gascoine v. Haringey Health Authority [1992] 3 Med LR 291 ***(refd)***

Haynes v. Atkins (The Times, 12 October 1983); [1983] CLY 2927 ***(refd)***

Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd) v. Tan Chin Kah & Anor. [1991] 2 MLJ 324 ***(not foll)***

Rakyat First Merchant Bankers Bhd. v. DYMM Tunku Najihah bte Tunku Besar Burhanuddin & Ors. [1993] 1 CLJ 156 ***(refd)***

Roebuck v. Mungovin [1994] 1 All ER 568 ***(foll)***

Samy Vellu, Datuk v. Karpal Singh [1989] 3 MLJ 493 ***(refd)***

Sel-Rex Corp v. PMD Chemicals Ltd. [1971] RPC 297 ***(refd)***

Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd. [1994] 2 MLJ 97 ***(foll)***

Shrimption v. Chegwyn [1995] 2 CL 450 ***(refd)***

Sim Lim Finance Ltd. v. Highlight Industry Pte Ltd. & Ors. [1987] 1 MLJ 182 ***(refd)***

Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***

Tolley v. Morris [1979] 2 All ER 561; [1979] 1 WLR 592 ***(refd)***
Trill v. Sacher [1993] 1 All ER 961 ***(foll)***
United Malayan Banking Corp Bhd. v. Palm and Vegetable Oils (M) Sdn. Bhd. & Ors; [1994] 3 CLJ 144; [1994] 3 MLJ 73 ***(refd)***
Vasudevan v. T. Damodaran & Anor. [1981] 2 MLJ 150 ***(refd)***
Wee Siew Noi v. Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd) [1993] 2 SLR 232; ***(refd)***
Westminster City Council v. Clifford Culpin & Partners [1987] 137 NLJ 736 ***(refd)***
Wong Yit Shing v. Sim Teow Gok & Co. [1994] 3 SLR 445 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 6, O. 13, O. 19 r. 1, O. 24 r. 16(1), O. 25 r. 1(4), (5), O. 28 r. 10 (1), O. 34 r. 2(2)

For the plaintiff - Yougesswary Singam, M/s. Nordin Torji & Yussof Ahmad.
For the first and sixth defendants - Oon Lay Lean M/s. Suhaimi Khor Zulkifli & Chang

JUDGMENT

Visu Sinnadurai J:

Facts

Over nine years ago, on 10 December 1985, two houses under construction collapsed. These houses were part of a development undertaken by the plaintiff on a hill slope known as Phase 3A in an overall development called Taman Melawati, Setapak, Kuala Lumpur. The plaintiff, as a consequence, commenced legal proceedings against the seven defendants abovenamed who were all involved in the construction of the project.

However, on 15 September 1993, the first defendant (Akitek Bersekutu Malaysia), a firm of consulting architects engaged to provide professional consulting services and other related services in relation to the project, and the sixth defendant (Jurukur Bahan AAR), a firm of quantity surveyors engaged by the plaintiff on the advice of the first defendant, applied successfully to the Senior Assistant Registrar ('SAR') to strike out the plaintiff's action against them for want of prosecution. The plaintiff then appealed to this Court against this decision of the SAR.

The chronology of events leading to the defendants' application is as follows: The plaintiff issued the writ and statement of claim against the defendants on 3 December 1986, both of which were further amended on 4 February 1987 and 8 September 1987 respectively.

The first defendant then filed its defence on 2 January 1987, and further filed a summons-in-chambers dated 10 May 1987 to amend its defence to include a set-off and counter-claim. The first defendant, however, did not serve the sealed amended defence on the plaintiff. The sixth defendant filed its defence on 23 January 1987.

On 8 March 1989, that is, over two years after the filing of its claim, the plaintiff filed a summons for directions, and duly obtained an order on 14 April 1989. The said order made by the SAR provided, *inter alia*, as follows:

(i) the plaintiff within 30 days to serve on the defendants a list of documents and an affidavit verifying such list;

(ii) the defendants within 30 days to serve on the plaintiff a list of documents and an affidavit verifying such list;

(iii) there be inspection of documents within 30 days of service of the list of documents and affidavit verifying the list; and

(iv) that trial be set down within 90 days.

From the date of the order of the SAR, that is 14 April 1989, to 28 August 1991, a period of well over two years, no steps to proceed with the action were taken either by the plaintiff or the defendants. It was only on 28 August 1991, that the next step in the proceedings was taken when the first defendant filed and served its list of documents and affidavit verifying the list.

As for the plaintiff, it took no action after the order of the SAR dated 14 April 1989 until 6 November 1991, when it filed a notice of intention to proceed.

It appears that this action of the plaintiff prompted the first and sixth defendants to take further steps in the proceedings. The first and sixth defendants then filed a summons-in-chambers dated 11 December 1991 to strike out the plaintiff's claim for want of prosecution, but however, withdrew the same on 26 February 1992.

Soon after, but however, almost three years after the order of the SAR, the plaintiff filed an affidavit verifying the list of documents for the first defendant for 5 March 1992.

Finally the first and sixth defendants filed a summons-in-chambers dated 15 September 1993 to strike out the plaintiff's claim for want of prosecution under O. 34 r. 2(2) of the Rules of the High Court 1980.

On 16 December 1993, about three months after the first and sixth defendants had filed an application to strike out the plaintiff's claim, the plaintiff then filed a notice of intention to proceed. The plaintiff also filed the bundle of pleadings and set the action down for trial on 5 January 1994.

The SAR, in allowing the application of the first and the sixth defendants, struck off the plaintiff's claim against them on the grounds (so it is said) that the plaintiff had failed to comply with the order of the SAR in that the plaintiff

had failed to set the action down for trial within 90 days as stated in the said order; and also in exercise of the inherent jurisdiction of the Court to dismiss actions for want of prosecution.

Plaintiff's contention

The plaintiff's main contention in the present appeal is that the SAR was wrong in allowing the first and sixth defendants' application to strike out the plaintiff's case for want of prosecution. The plaintiff argues that the conduct of the defendants themselves was such that the defendants' application to strike out ought not to have been allowed. It was argued by the plaintiff that from the sequence of events, it was clear that the first and sixth defendants themselves had failed to come to Court with clean hands, as they had failed to comply with the rules of procedure, namely:

(i) the first defendant had not served on the plaintiff its sealed amended defence with the set-off and counterclaim;

(ii) the first defendant had failed to proceed in respect of the counterclaim and had further failed to pursue it with all due diligence;

(iii) the first defendant only filed its list of documents and affidavit verifying the list on 28 August 1991, i.e. two years and four months after the order dated 14 April 1989 was made on the summons for directions; and

(iv) the sixth defendant had failed to file and serve its list of documents and affidavit verifying the list of documents in compliance with the order of Court dated 14 April 1989.

It must be stressed that the plaintiff's main ground for challenging the decision of the SAR is that the SAR had failed to take into consideration the conduct of the defendants. The plaintiff admits that it had not pursued with its action with due speed. This, it explains, was because of the difficulty it encountered in obtaining the relevant documents to establish its case.

In support of its contention that the conduct of the defendant is a relevant factor to be considered in applications for striking out cases for want of prosecution, the plaintiff relied on the Singapore decision of Chao Hick Tin J in the High Court in *Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd) v. Tan Chin Kah & Anor.* [1991] 2 MLJ 324, and the decision of Siti Norma Yaakob J in *Rakyat First Merchant Bankers Bhd. v. DYMM Tunku Najihah bte Tunku Besar Burhanuddin & Ors.* [1993] 1 CLJ 156.

Preliminary observations

Though this is an appeal against the decision of the SAR, the hearing before me is, in fact, by way of an actual rehearing. As pointed out by the Supreme Court in the recent case of *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng*

Ting (Sabah) Sdn. Bhd. [1994] 2 MLJ 97, I am in no way fettered by the findings of the SAR, especially so, as in *Seloga's* case, no reasons were given by the SAR by way of a written judgment.

Therefore , in accordance, with the principles stated by the Supreme Court in *Seloga's* case, I am in a position to exercise an independent discretion of my own in deciding whether the defendants' application to strike out the plaintiff's claim for want of prosecution ought to be allowed. In this regard, I bear in mind the principles spelt out by Edger Joseph Jr SCJ in *Seloga's* case. His Lordship said ([1994] 2 MLJ 97 at p. 106):

> Two things are plain from the above passage in the judgment of Lord Atkin [in *Evans v. Bartlam* [1937] AC 473; [1937] 2 All ER 646], namely:
>
> (1) in an appeal from a discretionary order of the Master (equivalent here to a Senior Assistant Registrar) to a Judge-in-chambers, the Judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the Master's discretion; and
>
> (2) So far as the Master's decision is concerned, the Judge will give it the weight it deserves.

The law

(1) Underlying Principles

The underlying principle in striking out for want of prosecution is that a plaintiff who has commenced an action against a defendant must comply with the prescribed rules of practice to prosecute his actions expeditiously. Just as Parliament has imposed a time limit within which a plaintiff must commence his action from the time of its accrual, the rules of Court also prescribe a certain time frame for the prosecution of it. As Sir Thomas Bingham MR pointed out in *Costellow v. Somerset County Council* [1993] 1 All ER 952 at p. 959:

> ... the rules of Court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the Court a discretion to dismiss on failure to comply with a time limit. ... This principle is also reflected in the Courts' inherent jurisdiction to dismiss for want of prosecution.

The rules of Court which were referred to by his Lordship are also embodied in our Rules of the High Court 1980: O. 19 r. 1 (default in service of statement of claim); O. 24 r. 16(1) (failure to comply with requirements for discovery); O. 25 r. 1 (4) and (5) (failure to take out summons for directions); O. 28 r. 10(1) (failure to prosecute matter begun by originating summons with

dispatch); and O. 34 r. 2 (2) (failure on the part of the plaintiff to set down action begun by writ for trial). Order 34 r. 2(2) is of particular importance to the present case.

However, over the years, the Courts, so as not to cause great hardship or injustice to the plaintiff, have soft pedalled on the strict enforcement of these rules setting a time limit on the plaintiff to take the necessary steps in the prosecution of the action.

Therefore, so as not to deny the plaintiff an opportunity to have his claim adjudicated on its merits because of any procedural default, the Courts have in certain situations held that no action ought to be dismissed unless the defendant could show that the default of the plaintiff had caused him prejudice or a real risk of prejudice, for which an award of costs could not compensate. In *Costellow's* case, it was held that in the absence of special circumstances, such as procedural abuse, questionable tactics, contumelious and intentional default, or where a default was repeated or persisted in after a peremptory order, the Court ought not to exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of the proceedings had caused at least a real risk of prejudice to the defendant. Sir Thomas Bingham MR added at p. 960, 'A similar approach shall govern applications made under O. 19, O. 24, O. 25, O. 28 and O. 34' (similar to the Rules of the High Court 1980 referred to above).

It should, however be stressed that the procedural rules of the Court which were formulated in the interest of Justice confer on the Courts a wide discretion whether to strike out an action. In recent years, the Courts have not only considered the effect of a delay in the prosecution of the action by the plaintiff on the defendant, but also the cumulative effect it has on the speedy disposal of cases filed in the Courts. Backlog of cases in the Courts is a universal problem, and to overcome this, changes have to be introduced for the speedier disposal of cases. In England, for example, it has been recommended that if certain procedural rules are not complied with within a certain time frame, the action commenced by the plaintiff ought to lapse automatically: see generally the recently published book, Andrews, *Principles of Civil Procedure* (1994), particularly Ch 20, 'Persistent problems: Access to justice; delay; complexity and excessive cost'.

It has been further suggested that striking out for want of prosecution in appropriate cases is one potent weapon in reducing the backlog of cases in Courts. In this regard, the views expressed by Kerr LJ in *Westminster City Council v. Clifford Culpin & Partners* [1987] 137 NLJ 736 at pp. 737-738 are poignant:

> There are constant complaints about delays in our legal processes and suggestions for reforms, such as the current *Civil Justice Review* by the Lord Chancellor's Department. But no changes in the organization or administration of the Courts would make any material difference to cases such as the present. By far the major part of all delays stems solely from the way in which litigation is conducted. In this connection our law needs to be changed, both in substance and procedurally. The principles laid down in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801 are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover they then breed excessive further delays and costs in their application. The long line of decisions concerned with striking out applications, both reported and unreported, demonstrate that the regime of *Birkett v. James* should be replaced by a system of rules which are much stricter, more effective and simple to apply. And it is highly questionable whether plaintiffs should be allowed the benefit of the full periods of limitation, with virtual impunity, where the facts are known and there is no obstacle to the speedy institution and prosecution of claims. The present system provides insufficient sanctions for those responsible for the dilatory and inefficient conduct of litigation, and it is frequently unfair to litigants.

(2) General Principles

The general principles governing the power of the Courts to strike out actions for want of prosecution are well settled. In *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801; [1977] 3 WLR 38, the House of Lords in approving the decision of the Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 firmly established the principle that a Judge has a discretionary power to strike out an action for want of prosecution in the following circumstances:

> (1) that the default has been intentional and contumelious, for example, disobedience of a peremptory order of the Court or conduct amounting to an abuse of the process of the Court ; or
>
> (2) (a) that the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim; and
>
> (b) That such delay gives rise to substantial risks that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the defendant.

These principles of law were expressly approved by the House of Lords in *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] AC 1197; [1989] 1 All ER 897; [1989] 2 WLR 578, and more recently in *Roebuck v. Mungovin* [1994] 1 All ER 568. For an instructive exposition of the various principles applicable in a striking out application for want of prosecution, see the 14 guidelines spelt out by Neill LJ in *Trill v. Sacher* [1993] 1 All ER 961 at pp. 978-980. These guidelines, especially those dealing with the conduct of the defendant, based on waiver, acquiescence or estoppel has now to be read in the light of the decision of the House of Lords in *Roebuck v. Mungovin*, discussed below.

Lord Griffiths in *Chris Smaller's* case above, also clarified three other issues relating to striking out for want of prosecution which remained unsettled even after the decisions in *Allen v. McAlpine* and *Birkett v. James*. These relate to:

(a) striking out an action within the limitation period;

(b) the late issue of a writ; and

(c) solicitor's negligence.

(3) Limitation

(a) It is now generally accepted that only in wholly exceptional circumstances should an action be struck out within the relevant limitation period, because the plaintiff would be able to issue a fresh writ which would result in the action being heard at an even later date as a result of the striking out. This principle was further explained by Neill LJ in *Trill v. Sacher* at p. 979 as follows:

> Save in exceptional cases an action will not be struck out for want of prosecution before the expiry of the relevant limitation period (see *Birkett v. James* [1977] 2 All ER 801 at p. 807; [1978] AC 297 at p. 321). It is not altogether clear how this rule is best explained. It may be that before the limitation period has expired the delay cannot properly be regarded as 'inordinate' (cf *Birkett v. James* [1977] 2 All ER 801 at p. 807; [1978] AC 297 at p. 321). Alternatively, it may be that, though the delay is both inordinate and inexcusable, the Court would not in the ordinary case exercise its discretion to strike the action out if a fresh writ could be issued at once. To do so would only delay the trial.

(b) Time that has lapsed between the accrual of the cause of action and the issue of the writ within the limitation period cannot constitute inordinate and inexcusable delay. Lord Griffiths pointed out in *Chris Smaller's* case ([1989] AC 1197 at p. 1203; [1989] 1 All ER 897 at p. 900; [1989] 2 WLR 578 at p. 582):

> Although a defendant may well have been prejudiced by this delay and in some cases it may even make it difficult to have a fair trial, these considerations do not justify striking out an action which a plaintiff has commenced within the period of limitation set by Parliament. The plaintiff must have been guilty of inordinate and inexcusable delay in the prosecution of the action after the issue of the writ and the defendant must show prejudice flowing directly from the post-writ delay which must be additional to any prejudice suffered because the plaintiff did not commence his action as soon as he could have done so.

(4) Solicitor's Negligence

The fact that the plaintiff may or may not have an alternative remedy against his solicitor is not a relevant consideration in deciding whether or not to dismiss an action for want of prosecution.

(5) Prejudice or fair trial unlikely

It was clearly established in *Chris Smaller's* case that for the defendant to succeed in his action to strike out the plaintiff's claim for want of prosecution, it was not sufficient merely to establish inordinate and inexcusable delay. A further burden is imposed on the defendant to establish either that a fair trial was impossible, or some other prejudice would be suffered by the defendant as a result of the delay.

It must be pointed out as emphasized by Lord Griffiths in *Chris Smaller's* case, that prejudice to the defendant is not limited to proof of prejudice in the conduct of the litigation alone. The proper test, as stated in *Allen v. McAlpine* and *Birkett v. James*, is that the defendant may, to strike out the plaintiff's action, establish that as a result of the plaintiff's delay there was a risk of either:

(a) there not being a fair trial of the action ; or

(b) of some other prejudice to the defendant other than the mere inability to have a trial.

(a) Fair trial

It is generally said that if the trial is based largely on oral evidence of the parties and their witnesses, and the long delay would have impaired the memory of the witnesses, there was in such cases a substantial risk that it was not possible to have a fair trial of the issues in the action. Similarly in situations where the key witnesses have died or could not be traced. If on the other hand, the issues in the action were based essentially on documentary evidence, the delay may not give rise to a risk that it was not possible to have a fair trial.

(b) Prejudice

If the defendant is unable to show that the delay will give rise to a substantial risk that it was not possible to have a fair trial, the defendant may, if he has already established inordinate and inexcusable delay on the part of the plaintiff, succeed in setting aside the action if he establishes that the delay has caused or is likely to cause him serious prejudice.

However, as to whether the defendant in any particular case has established serious prejudice is a matter for the Courts to determine. Again to quote Lord Griffiths in *Chris Smaller* ([1989] AC 1197 at p. 1209; [1989] 1 All ER 897 at p. 904; [1989] 2 WLR 578 at p. 587):

> ... prejudice may be of varying kinds and is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorize the type of prejudice justifying striking out an action ...

A study of some of the earlier decisions seems to indicate that in the following instances, the defendant may establish sufficient prejudice to warrant the striking out of an action:

(i) Professional Persons

In *Biss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 2 All ER 125; [1978] 1 WLR 382, the Court of Appeal considered that the anxiety suffered by nurses whose professional competence was in question was sufficient prejudice to justify the striking out of the action. This decision was approved by the House of Lords in *Chris Smaller's* case; and by Lord Diplock in *Tolley v. Morris* [1979] 2 All ER 561 at p. 568; [1979] 1 WLR 592 at p. 600 (HL), and was also referred to by our then Federal Court in *Vasudevan v. T. Damodaran & Anor.* [1981] 2 MLJ 150 by Abdoolcader J (as he then was); and in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] MLJ 152 by Salleh Abas FJ (as he then was). It was applied by Lim Beng Choon J in *Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 493, but was distinguished by Lim Teong Qwee JC in the recent Singapore High Court decision in *Wong Yit Shing v. Sim Teow Gok & Co.* [1994] 3 SLR 445.

In *Haynes v. Atkins* (*The Times*, 12 October 1983); [1983] CLY 2927, referred to by Lord Griffiths in *Chris Smaller's* case, the delay hanging over a professional man was taken into account as a ground of prejudice.

Similarly in *Datuk Samy Vellu v. Karpal Singh*, Lim Beng Choon J in applying *Biss's* case, held that the defendant who was a lawyer 'and quite a well-known personality in the profession', besides being a Member of Parliament' was prejudiced by the plaintiff's delay of eight years in prosecuting the libel action against the defendant. His Lordship observed at p. 496, 'This psychological effect caused by this suit hanging over his head for such a long period will surely cause or have caused prejudice to the defendant'.

Datuk Samy Vellu's case was not followed by the Singapore High Court in the recent case of *Wong Yit Shing*. It was distinguished on the ground that though the defendants in both cases were lawyers, on the facts, the defendant in *Wong Yit Shing* had failed to establish any prejudice.

(ii) Financial prejudice

A defendant may also establish prejudice by showing that the plaintiff's delay had caused the defendant, particularly if he is running a business, financial loss. In *Chris Smaller's* case, Lord Griffiths clearly stated that such prejudice was sufficient to strike out an action. His Lordship said ([1989] AC 1197 at p. 1209; [1989] 1 All ER 897 at p. 904; [1989] 2 WLR 578 at p. 587):

> The decisions of the Court of Appeal in *President of India and Union of India v. John Shaw & Sons (Salford) Ltd.* (*The Times*, 27 October 1977) and *Bridgnorth DC v. Henry Willcock & Co. Ltd.* [1983] CA Transcript 958 are further examples of the Court taking business prejudice into account as a ground for striking out ...

His Lordship added ([1989] AC 1197 at p. 1209; [1989] 1 All ER 897 at p. 905; [1989] 2 WLR at p. 587):

> ... there can be no doubt that if the defendants had been able to establish significant damage to their business interests, flowing directly from the culpable delay... a Judge would have been entitled to regard it as prejudice justifying striking out the action.

Similarly, Lord Denning Mr. in *Biss's* case observed ([1978] 2 All ER 125 at p. 131; [1978] 1 WLR 382 at p. 389):

> So in the *President of India* case... The business house was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it.

More recently in *Antcliffe v. Gloucester Health Authority* [1992] 1 WLR 1044 and *Gascoine v. Haringey Health Authority* [1992] 3 Med LR 291, it was held that where a health authority was put into greater financial burden by the plaintiff's delay, this constituted sufficient prejudice: see generally 1 *The Supreme Court Practice* (1995), para. 25/1/6, at p. 474.

(6) Defendant's Conduct

However, of particular relevance to the present case is the question whether in exercising its discretion, the Court ought to consider the conduct of the defendant. As stated earlier, it has been argued that in this case, the SAR was wrong in allowing the defendants' application as she did not sufficiently consider the conduct of the defendants.

I now move to consider whether there is any principle of law which bars a defendant from succeeding in an application to strike out for want of prosecution on the grounds that the conduct of the defendant was such that the Court had no discretion to strike out the claim or, in exercise of its discretion ought not to strike it out.

As stated earlier, the plaintiff relied on the Singapore decision of Chao Hick Tin J in *Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd) v. Tan Chin Kah & Anor*. [1991] 2 MLJ 324. In this case, Chao J held that as the defendant had inordinately delayed in the filing of its defence, the defendant was equally guilty of inordinate delay such that the discretion to dismiss the action for want of prosecution ought not to be exercised in the defendant's favour.

Neither Counsel for the plaintiff nor the defendants appearing before me, however, drew to my attention the fact that the decision of Chao Hick Tin J was reversed by the Singapore Court of Appeal subsequently. The Court of Appeal (reported as *Wee Siew Noi v Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd)* [1993] 2 SLR 232) held that the mere fact that the defendant had not filed his defence diligently did not by itself provide a ground for refusing to grant the defendant's application to dismiss the action. In so holding, the Court of Appeal expressly reversed the decision of Chao Hick Tin J in the High Court which, as stated earlier, was heavily relied upon by the plaintiff in the present case. Warren Khoo J in delivering the judgment of the Court of Appeal observed at p. 237:

> The defendant, in whom the carriage of proceedings does not lie, can properly refrain from taking any action and wait for the opportune moment to apply to dismiss the plaintiff's action for want of prosecution.

In some cases, it has been held that if the defendant's conduct was such that it amounts to an estoppel or positive acquiescence, the defendant will be barred from obtaining any relief from the Courts. These decisions, particularly those of the English Court of Appeal, which have so held that if the conduct of the defendant amounts to an estoppel, the Courts do not have the discretion to strike out an action, have now been reviewed by the House of Lords in the recent decision in *Roebuck v. Mungovin* [1994] 1 All ER 568.

The House of Lords held that the Court of Appeal decision in *County & District Properties Ltd. v. Lyell* [1991] 1 WLR 683 (*Lyell's* case was decided in 1979 but was reported only in 1991), and the subsequent cases which followed it, were wrongly decided. Therefore, the rule stated in *Lyell's* case that:

> ... Whenever the defendant has induced the plaintiff to believe that the case is to go to trial (for example by the defendant taking steps to move the case on) he must be taken to have made a representation that the action is to be allowed to proceed to trial and if the plaintiff has incurred more than minimal costs in reliance on that representation the defendant will be estopped from striking out the claim on the grounds of the plaintiff's delay,

is no longer good law. In so overruling *Lyell's* case, Lord Browne-Wilkinson observed at p. 575, '... the introduction into the law of striking out of concepts of waiver, acquiescence or estoppel is merely confusing'.

His Lordship then reiterated that the correct test for the Courts to apply in striking out for want of prosecution was that stated by the Court of Appeal in the *McAlpine* case: once the preconditions of inordinate delay and prejudice to the defendant were established, the Court in its discretion may dismiss the action.

There was no other rule of law to deprive the Courts of this power to exercise their discretion, no matter what the conduct of the defendant may have been. Lord Browne-Wilkinson also explained the common error of some Judges in misconstruing certain dictum of Diplock and Salmon LJJ in *McAlpine's* case, as suggesting that certain conduct of the defendant may be such as to deprive the Courts of their discretion. His Lordship cautioned at p. 575, 'But words in a judgment should not be taken out of context and construed as though they were a statutory provision.'

The correct position of the law, therefore in cases where the subsequent conduct by the defendant induces the plaintiff to incur further expenses in pursuing the action is that, to quote Lord Browne-Wilkinson again, at p. 576, '(such conduct of the defendant) does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order'.

Lord Browne-Wilkinson, however, pointed out at p. 576:

> Such conduct of the defendant is, of course, a relevant factor to be taken into account by the Judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case. At one extreme, there will be cases like the present where the defendant's actions are minor (as compared with the inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure; in such a case a Judge exercising his discretion will be likely to attach only slight weight to the defendant's actions. At the other extreme one can conceive of a case where, the plaintiff having been guilty of inordinate delay, the defendant has for years thereafter continued with the action thereby leading the plaintiff to incur substantial legal costs; in such a case the Judge may attach considerable weight to the defendant's activities.

His Lordship concluded as follows at p. 576:

> But it is for the Judge in each case in exercising his discretion to decide what weight to attach in all the circumstances of the case to the defendant's actions and I trust that in the future there will be few occasions on which the Court of Appeal will be invited to review his (the trial Judge's) decision on the point.

One conduct of the defendant which the Courts generally tend to give considerable weight to, is the participation of the defendant himself in the delay. This is particularly so in cases where the defendant had actively been involved with the plaintiff in the negotiation for the settlement of the plaintiff's claim. In *United Malayan Banking Corp Bhd. v. Palm and Vegetable Oils (M) Sdn. Bhd. & Ors.* [1994] 3 MLJ 73, the Supreme Court held that the delay

in the prosecution of the plaintiff's claim caused during the period when both parties were negotiating a settlement, was a relevant factor to be considered in favour of the plaintiff. In this case, the Supreme Court further found that the negotiations were encouraged by the defendants which led the plaintiff 'to believe that an out of Court settlement would be reached'.

Similarly in the Singapore case of *Wong Yit Shing*, the High Court held that as the conduct of the defendants and their solicitors had encouraged the plaintiff to believe that the case may be settled through the negotiations which were taking place between the parties, the delay by the plaintiff in the prosecution of its case was 'clearly excusable'.

Both the Supreme Court in *United Malayan Banking Corp. Bhd.* and the Singapore High Court in *Wong Yit Shing* relied on the *dicta* of Whitford J in the case of *Sel-Rex Corp v. PMD Chemicals Ltd.* [1971] RPC 297, where his Lordship observed at p. 300:

> I think the delays that in fact occurred were excusable, because there was a reasonable expectation so far as the plaintiffs were concerned, in all the circumstances of the case, that a settlement might be negotiated and they were indeed even encouraged into this belief by the interview which was held between their emissary and a director of the defendants in the summer of 1969.

(7) Discretionary powers of the Court

One point, however, that must be stressed is that the power of the Court to strike out for want of prosecution is entirely discretionary. Therefore, in the second situation, if the two preconditions of inordinate delay and prejudice to the defendant are satisfied, the Court may in each case by considering the facts of the case exercise its own discretion to dismiss the action. This discretionary power of the Court is not fettered by any other rule of law other than the satisfaction of the said two preconditions. As explained by Lord Browne-Wilkinson in *Roebuck v. Mungovin*, the many other observations to the contrary by several Judges are merely obiter, which ought not to distract from the general principles enunciated in *Birkett v. James and Allen v. McAlpine*.

Present case

I now move on to consider whether the defendants in the present case have fulfilled the necessary preconditions so as to enable me to exercise my discretion to strike out the plaintiff's claim under O. 34 of the Rules of the High Court 1980, or in exercise of the inherent jurisdiction of the Court. In either case, the principles applicable are the same as stated above: see 1 *The Supreme Court Practice* (1995), para. 25/1/4, at p. 472 wherein it is stated:

> Generally speaking the same principles are applied whether the Court is acting under its express power (under the Rules of the Supreme Court) or under its inherent jurisdiction.

I should state that as the facts of the present case do not fall within the first situation as there is no suggestion that the plaintiff had been guilty of any intentional and contumelious default, in that the plaintiff had been deliberately defaulted in the compliance of any peremptory order of the Court, I need not consider this aspect of the law. It is the second situation which is of particular relevance to the present case.

(1) Inordinate and inexcusable delay

To recapitulate the facts of the present case, it must be borne in mind that the cause of action arose in December 1985. The writ was issued within a year in December 1986 (though it was subsequently amended), both the defences were filed in January 1987. Subsequently for two years there was inaction by the plaintiff. In March 1989, the plaintiff filed the summons for directions. Though the plaintiff was to serve the list of documents within 30 days from the order, that is 14 April 1989, the plaintiff did not do so until it filed a notice of intention to proceed in November 1991, a further delay of over two years and seven months. The plaintiff filed the affidavit verifying the list of documents only on 5 March 1992.

After the defendants had filed their application to strike out the plaintiff's action in September 1993, almost seven years and nine months after the issue of the writ, and four years and seven months after the order of the SAR, the plaintiff once again filed a notice of intention to proceed.

By this time, of course, the defendants had applied to strike out the plaintiff's action.

It can therefore be seen that there were many periods of delay on the part of the plaintiff. The delays are similar to those experienced by the defendant in *Trill v. Sacher* [1993] 1 All ER 961, where the Court of Appeal held that the several delays on the part of the plaintiff were relevant and could be taken into account by the Court in deciding whether to strike out the action. In that case, the delay of three years out of a period of six years and five months between the issue of the writ and the application to strike out was considered an inordinate and inexcusable delay on the part of the plaintiff. In the present case, the delay on the part of the plaintiff is at least four years and ten months out of a period of seven years from the issue of the writ to the application to strike out.

The plaintiff attributes this delay 'to the sheer complexity of the case'. Furthermore, the plaintiff explains this delay to the 'tedious filter down and technical know-how in compiling the relevant documents to be tendered as evidence'.

Whilst sympathetic to the problems encountered by the plaintiff, I am, however, not persuaded by this explanation. The complexity of a case provides no justification for the inordinate delay on the part of the plaintiff. But whatever the reasons, there is no denying that there was delay on the part of the plaintiff in the various stages of the proceedings. The defendants have, therefore, satisfied the first of the preconditions of establishing inordinate and inexcusable delay on the part of the plaintiff.

In *Trill's* case, it was also pointed out by the Court of Appeal that there was no rule of practice to provide that a defendant must apply to strike out an action within one month of the plaintiff serving a notice to proceed under O. 3 r. 6. Therefore, when such a notice is served on the defendant, he may remain inactive, and this may not be held against him, unless of course he consents to the action continuing. Quite obviously, the defendant may not make an application to strike out after the plaintiff had set down the action for trial.

(2) Defendant's conduct

As pointed out earlier, there is no rule of law stating that any inaction on the part of the defendant would bar him from obtaining an order to strike out the plaintiff's action: see *Trill* and *Roebuck*. The only exception to the rule appears to be where the defendant had taken an active role in negotiating a settlement with the plaintiff: see the discussion above. There is no such suggestion in the present case. The plaintiff merely relies on the fact that the defendants themselves had not complied with the order of the SAR. However, it must be remembered that the rules of the Court impose a duty on the plaintiff to get the machinery moving for the early disposal of the plaintiff's claim. Strictly speaking, the defendant is not burdened with a similar duty. If the defendant chooses not to take advantage of the rules which are in his favour, he bears the consequences of his omissions.

Furthermore, there are sufficient rules, like O. 13 (default of appearance); O. 19 (default of defence); and O. 24 r. 16 (failure to comply with order for inspection or discovery), providing the plaintiff with necessary relief like proceeding with the action, entering judgment against the defendant or having the defence struck off. The entire machinery does not come to a halt just because the defendant had not taken the next necessary steps. On the contrary, it is always for the plaintiff to take all the steps to prosecute the action.

I therefore conclude, in the light of the existing authorities, that the defendants' conduct in the present case does not in any way bar them from making the present application to strike out the plaintiff's action.

(3) Prejudice or risk of injustice

As pointed out earlier, it is not sufficient for the defendants merely to establish inordinate or inexcusable delay on the part of the plaintiff. The defendants need to establish further that there was serious prejudice to them or there was a risk that a fair trial was not possible.

The defendants in the present case allege that there was not only a risk of a fair trial not being possible, but also of serious prejudice.

(a) Fair trial not possible

The first and sixth defendants are both professionals, one, a firm of architects, the other, a firm of quantity surveyors. Unlike certain other professions, architects and quantity surveyors both rely on the skills and expertise of many others who are in their employ. Whilst the architect and the quantity surveyor bear full responsibility for their work, there is no denying that the assistance of their technical staff is essential. Over a period of years from the time the defendants were involved in the plaintiff's project as early as 1985 to the commencement of the present proceedings in 1986, and subsequently to the trial, well after 1994, many of the staff employed by the defendants are said no longer to be in a position to remember the relevant facts, particularly the details, of the case. The defendants have also pointed out that many of the staff who would be relevant witnesses have also left the service of the firm and could not be located.

This would invariably cause unfairness at the trial or prejudice the defendant in their ability to produce the necessary evidence to support their defence. As Neill LJ pointed out in *Trill v. Sacher* [1993] 1 All ER 961 at p. 980:

> Prejudice to the defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases, witnesses may die or move away and become untraceable.

In the recent decision of the English Court of Appeal in *Shrimption v. Chegwyn* [1995] 2 CL 450, it was held that the delay by the plaintiff to prosecute his claim for a period of eight years since the accident, was inordinate and inexcusable delay. This delay was prejudicial to the defendant as the memory of the critical witnesses to the accident would continue to fade during the period of delay which would create problems to the defendant.

Furthermore, it could not be said in this case, as it was held by the Supreme Court in *United Malayan Banking Corp Bhd. v. Palm and Vegetable Oils (M) Sdn. Bhd.* [1994] 3 MLJ 73 or by the Singapore High Court in *Sim Lim Finance Ltd. v. Highlight Industry Pte. Ltd. & Ors.* [1987] 1 MLJ 182, that as the evidence of the defendant was largely documentary, there would be no unfairness or prejudice to the defendant. The present case against the defendant is for negligence - negligence for the collapse of the two houses.

The plaintiff would certainly have no establish much more than documentary evidence to succeed in its case against the two defendants: see generally Duncan Wallace, *Hudson's Building and Engineering Contracts* (11th Edn, 1994) and Jackson and Powell, *Professional Negligence* (3rd Edn.,).

(b) Prejudice

As seen earlier, the defendants need not firmly establish that the delay had already caused serious prejudice to them. The proper test is that the delay had not only caused prejudice, but also whether it is likely to do so. For so long as the delay is likely to cause serious prejudice, there is also a risk that it is not possible to have a fair trial.

One factor to bear in mind is that as both the defendants are professionals, the longer the case is delayed, the greater would be the loss to their reputation.

I must, however, emphasize that I have taken note of the fact that though both the defendants are professionals, this by itself is not sufficient to indicate prejudice so as to warrant the striking out of the action. It is only one of the factors I have taken into account, but it is certainly not the sole factor. In this regard, the caution expressed by Lord Griffiths in *Department of Transport v. Chris Smaller (Transport) Ltd.* has to be borne in mind. Lord Griffith observed ([1989] AC 1197 at p. 1209; [1989] 1 All ER 897 at p. 905; [1989] 2 WLR 578 at p. 587):

> There are, however, passages in some of the judgments that suggest that the mere sword of Damocles, hanging for an unnecessary period, might be a sufficient reason of itself to strike out. On this aspect I repeat the note of caution I expressed in the Court of Appeal in *Eagil Trust Co. Ltd. v. Piggot Brown* [1985] 3 All ER 119 at p. 124, where I said:
>
> > Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice. *Biss's* case is an example of such an exceptional case, the action hanging over for 11½ years, with professional reputations at stake.

Conclusion

Considering the circumstances of this case, I hold that the delay on the part of the plaintiff to prosecute its claim is inexcusable and inordinate.

This delay would not only result in a fair trial not being possible, but has also caused serious prejudice to the defendants. As the case depends mainly on oral testimony rather than documentary evidence, the testimony of witnesses is crucial. However, certain of these witnesses cannot be traced, and those who are available, their memory may be impaired by the long delay, a period of almost ten years. Together with this factor, the fact that both the defendants

are professionals is an important factor, not necessarily the sole factor, to be considered. Furthermore, the defendants had not contributed in the delay by being involved in any negotiation for the settlement of the claims.

I therefore allow the defendants' application to dismiss the plaintiff's claim for want of prosecution. The appeal therefore, by the plaintiff against the decision of the SAR is dismissed.

Reported by Satish Nair